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No. 08-531

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

MISSOURI PUBLIC SERVICE COMMISSION, ET AL.,
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC MISSOURI
(N/K/A SOUTHWESTERN BELL TELEPHONE COMPANY
D/B/A AT&T MISSOURI), ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT SOUTHWESTERN BELL TELEPHONE COMPANY IN OPPOSITION

TIMOTHY P. LEAHY
ROBERT J. GRYZMALA
SOUTHWESTERN BELL
TELEPHONE COMPANY
D/B/A AT&T MISSOURI
LEGAL DEPARTMENT
One AT&T Center
Room 3520
St. Louis, Missouri 63101
(314) 235-4300

MICHAEL K. KELLOGG
Counsel of Record
SEAN A. LEV
COLIN S. STRETCH
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for AT&T Missouri

November 21, 2008

QUESTION PRESENTED

Whether this Court should grant review of the Eighth Circuit's judgment to address an issue never addressed or resolved in the Eighth Circuit's decision – namely, whether a federal regulation, 47 C.F.R. § 51.309, authorizes state public utility commissions to require incumbent telephone companies to offer their competitors the ability to lease pre-combined groups of the incumbents' facilities.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Southwestern Bell Telephone Company d/b/a AT&T Missouri (formerly known as Southwestern Bell Telephone, L.P. d/b/a SBC Missouri) states the following:

Southwestern Bell Telephone Company d/b/a AT&T Missouri is a wholly owned, indirect subsidiary of AT&T Inc., which is a publicly held company. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

During the pendency of the proceedings before the district court and the court of appeals, respondent was organized as a limited partnership known formally as Southwestern Bell Telephone, L.P. Beginning on June 21, 2007, the limited partnership was discontinued and it became a Missouri corporation known formally as Southwestern Bell Telephone Company.

Respondent here refers to itself by its trade name, AT&T Missouri.

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INTRODUCTION

There is no conflict in the circuits that could warrant this Court's review. In the decision below, the Eighth Circuit held that state public utility commissions lack authority to implement 47 U.S.C. § 271, a provision of the Telecommunications Act of 1996 ("the 1996 Act"). *See* Pet. App. 9a-12a. That holding is consistent with every other federal court to have addressed the question – nine district courts and the First Circuit, which is the one other circuit court to have reached the issue. Each of these courts has held that the Federal Communications Commission ("FCC") has exclusive jurisdiction over § 271.[1]

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[1] *See Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 4-6 (1st Cir. 2007); *BellSouth Telecomms., Inc. v. Georgia Pub. Serv. Comm'n*, Nos. 1:06-cv-00162-CC & 1:06-cv-00972-CC, slip op. at 7-12 (N.D. Ga. Jan. 3, 2008), *appeals pending*, Nos. 08-10521-AA & 08-10522-AA (11th Cir. argued Oct. 8, 2008); *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL 2868633, at *5-*6 (E.D. Mich. Sept. 26, 2007), *appeals pending on other grounds*, Nos. 07-2469 & 07-2473 (6th Cir. to be argued Dec. 10, 2008); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, No. 06-65-KKC, 2007 WL 2736544, at *5-*7 (E.D. Ky. Sept. 18, 2007); *Qwest Corp. v. Arizona Corp. Comm'n*, 496 F. Supp. 2d 1069, 1077-79 (D. Ariz. 2007), *appeals pending*, Nos. 07-17079 & 07-17080 (9th Cir. filed Nov. 18, 2007); *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149, 2006 WL 2796488, at *13-*14 (N.D. Ill. Sept. 28, 2006), *appeals pending*, Nos. 08-1489 & 08-1494 (7th Cir. argued Sept. 19, 2008); *Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n*, 447 F. Supp. 2d 1281, 1285-86 (N.D. Fla. 2006), *appeal voluntarily dismissed with prejudice*, No. 06-15589-DD (11th Cir. Dec. 12, 2006) (per curiam); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1066-69 (E.D. Mo. 2006), *aff'd in relevant part*, 530 F.3d 676, 682-83 (8th Cir. 2008); *Verizon New England Inc. v. New Hampshire Pub. Utils. Comm'n*, No. 05-cv-94-PB, 2006 WL 2433249, at *8 (D.N.H. Aug. 22, 2006), *aff'd sub nom. Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1 (1st Cir. 2007); *BellSouth*

Petitioners claim that the decision below conflicts with an Eleventh Circuit decision addressing a different question – namely, whether a specific regulation (47 C.F.R. § 51.309) authorizes state commissions to require incumbent local exchange carriers to offer their competitors the ability to lease pre-combined groups of the incumbents' facilities. Because the Eighth Circuit did not consider that question in this case, there is no division of authority even arguably warranting the Court's review.

STATEMENT OF THE CASE

1. To promote competition in the market for local telephone service, Congress in the 1996 Act imposed various obligations on incumbent local exchange carriers ("incumbent LECs" or "incumbents") such as AT&T Missouri to assist competitive local exchange carriers ("competitive LECs" or "competitors") in entering the market. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). This case involves two separate provisions of the 1996 Act: 47 U.S.C. § 251 and 47 U.S.C. § 271.

a. Section 251 obligates incumbents to lease certain network elements to competitors at regulated rates. The statute directs the FCC to determine which elements must be made available under § 251(c)(3), *see* 47 U.S.C. § 251(d)(2), and those facilities are known as "unbundled" network elements, or "UNEs." When a facility is designated as a UNE by

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Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n, 368 F. Supp. 2d 557, 565-66 (S.D. Miss. 2005). The lone contrary decision, *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), was vacated and remanded by the First Circuit in *Verizon New England*, 509 F.3d 1.

the FCC, incumbents must offer the element at artificially low rates set by state commissions.[2]

Section 251's network-sharing obligations are not self-executing, but instead are implemented through "interconnection agreements." Incumbents and competitors negotiate those agreements in the first instance. Where they are unable to agree, § 252 authorizes state commissions to act as arbitrators. *See id.* § 252(b)-(d). State commissions' arbitration authority is confined to matters addressed in § 251. *See id.* § 252(c)-(d); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (per curiam).

b. Section 271 authorizes the FCC to grant the largest incumbent LECs, known as Bell operating companies ("BOCs"), authority to provide long-distance service in a given state, provided the BOC satisfies statutory criteria designed to confirm that the local market in the state is open to competition. *See* 47 U.S.C. § 271(d)(3); *AT&T Corp. v. FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000). Those criteria include a showing that the BOC satisfies the "[c]ompetitive checklist" – which is a list of services and facilities that the BOC must make available to competitors operating in the state. 47 U.S.C. § 271(c)(2)(B).

Unlike § 251, where Congress gave state commissions a role to play in implementing the federal regime, Congress granted the FCC exclusive authority to implement § 271. Congress granted the FCC alone the responsibility to approve or reject BOCs' applications to offer long-distance service, *see id.* § 271(d)(3),

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[2] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*") (noting that UNE rates "fall well below the costs the [incumbents] had actually historically incurred in constructing the elements").

and it empowered the FCC alone to enforce the requirements of § 271 after approval, *see id.* § 271(d)(6). Congress gave the states only an advisory role in the § 271 application process. *See id.* § 271(d)(2)(B).

In addition, the rates incumbents may charge competitors for access to § 271 elements differ markedly from the rates they are required to charge for § 251 UNEs. Section 251(d)(2), which sets the pricing standard for UNEs, does not apply to § 271 elements. Instead, 47 U.S.C. §§ 201 and 202, which require rates to be just, reasonable, and nondiscriminatory, establish the standard for assessing the rates at which BOCs provide § 271 elements. *See Triennial Review Order*,[3] 18 FCC Rcd at 17389, ¶ 664; *USTA II*, 359 F.3d at 589 (rejecting a challenge to the *Triennial Review Order* on this point). Applying that standard to § 271 elements, the FCC has said that "the market price should prevail, as opposed to a regulated rate." *UNE Remand Order*,[4] 15 FCC Rcd at 3906, ¶ 473.

Finally, the FCC has held that elements that are required only under § 271 – unlike elements required under § 251 – need not be provided in combined, pre-packaged form. *See Triennial Review*

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[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

[4] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

Order, 18 FCC Rcd at 17386, ¶ 655 n.1990 ("We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."); *see also USTA II*, 359 F.3d at 589-90 (affirming FCC's no-combinations holding).

2. On three occasions from 1996 through 2003, the FCC purported to implement § 251 by issuing orders that imposed "blanket" unbundling. *Iowa Utils. Bd.*, 525 U.S. at 390. With limited exceptions, these FCC orders required incumbents to make available as UNEs – and thus at artificially low, regulated rates – all of the basic elements of their local telephone networks in pre-combined form. This requirement, known as the "UNE-Platform," permitted competitors to provide service using only the incumbents' facilities, priced at the deeply discounted rates that apply to UNEs. *See* Pet. App. 6a.

Each time the FCC imposed blanket unbundling, the federal courts vacated the rules as inconsistent with the 1996 Act's goal of encouraging competitors to compete using their own facilities. *See Iowa Utils. Bd.*, 525 U.S. at 388-92; *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"); *USTA II*, 359 F.3d 554. After the last of those judicial vacaturs, the FCC issued an order in 2005 that established, among other things, that competitive LECs could no longer obtain the "UNE-Platform." *See* Pet. App. 6a.

3. In the aftermath of the FCC's 2005 order, some state commissions sought to continue to require incumbents to provide the UNE-Platform despite the FCC's elimination of blanket unbundling. Faced with the FCC's conclusion that § 251 does not require incumbents to offer the UNE-Platform, these state

commissions relied on § 271 instead. In the order at issue in this case, the Missouri commission – petitioner here – concluded that § 271 provided it authority to require AT&T Missouri to continue to provide the UNE-Platform to competitors at regulated rates. *See* Pet. App. 8a, 32a, 118a-119a.

a. AT&T Missouri initiated this action to obtain declaratory and injunctive relief from the Missouri commission's order. It contended that the order violated federal law for multiple reasons. First, AT&T Missouri argued that the Missouri commission lacked authority to implement § 271. Second, AT&T Missouri argued that, regardless of the source of its purported authority, the Missouri commission's order conflicted with substantive FCC rules in two ways: (i) it required AT&T Missouri to provide access, at rates set by the commission, to elements that the FCC had said should be priced at market rates; (ii) it directed AT&T Missouri to "combine" elements available under § 271, despite the FCC's holding that § 271 (unlike § 251) does not include a requirement to combine facilities.

Agreeing with AT&T Missouri's first contention, the district court held that the Missouri commission lacked authority to implement § 271. *See* Pet. App. 31a-38a. The court explained that "[t]he text of § 271 gives the FCC exclusive jurisdiction over the enforcement of that section" and that the state commission's "only role" under § 271 is "to act as consultant to the FCC during the application process." *Id.* at 34a.

The district court also agreed that the Missouri commission's order conflicted with substantive rules promulgated by the FCC. *See id.* at 39a-42a. The court explained that the Missouri commission unlawfully required AT&T Missouri (i) to "combine"

facilities that are required only under § 271 with facilities required under § 251, and (ii) to provide competitors "the same substantive combination as the UNE Platform" at a rate set by the state commission. *Id.* at 39a.

b. In affirming, the Eighth Circuit addressed only the first rationale supporting the district court's judgment – *i.e.*, the district court's conclusion that the Missouri commission violated federal law in purporting to implement § 271. The court explained that "the plain language of § 271 makes clear states have no authority to interpret or enforce the obligations of" that provision. Pet. App. 10a (citing *Verizon New England*, 509 F.3d at 7). The court further noted that the 1996 Act does authorize states to implement § 251. The contrast between § 251 on the one hand and § 271 on the other hand "'confirms that when Congress envisaged state commission power to implement the statute, it knew how to provide for it.'" *Id.* at 11a-12a (quoting *Verizon New England*, 509 F.3d at 7). The court accordingly "join[ed]" the other federal courts – including the First Circuit – that unanimously "have concluded the FCC has exclusive jurisdiction over § 271." *Id.* at 12a; *see supra* note 1 (collecting decisions reaching the same conclusion).

The Eighth Circuit did not reach the district court's separate holding that federal law foreclosed the Missouri commission's requirement that AT&T Missouri "combine" facilities that are required only under § 271 with facilities required under § 251.

REASONS FOR DENYING THE PETITION

1. The petition seeks review of the Eighth Circuit's judgment in order to address whether the FCC's "commingling" rule, 47 C.F.R. § 51.309, requires incumbent LECs to combine facilities that are made available pursuant to § 271 with facilities made available pursuant to § 251. The petition contends (at 7-11) that the Eighth Circuit's ruling on that point conflicts with the Eleventh Circuit's decision in *NuVox Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330 (11th Cir. 2008) (per curiam). But there is no conflict, because, whereas the Eleventh Circuit's decision in *NuVox* actually addressed the issue the petition seeks to raise, the Eighth Circuit's decision in the case at issue here did not.

In the state proceeding at issue in *NuVox*, the Florida commission concluded that interpreting the FCC's commingling rule to require incumbents to provide "combinations of section-251 and section-271 facilities would be contrary to federal policy." 530 F.3d at 1332. The Florida commission did not in that proceeding address the issue in this case – that is, whether state commissions have authority to implement § 271. The district court in *NuVox* reversed the Florida commission's determination, concluding that the FCC's commingling rule requires BOCs to combine facilities provided under § 271 with those that must be provided under § 251. *See NuVox Communications, Inc. v. Edgar*, 511 F. Supp. 2d 1198, 1203-04 (N.D. Fla. 2007). The court of appeals affirmed, addressing solely "[t]he issue . . . whether [a BOC] is required to commingle section-271 elements with section-251 unbundled network elements." 530 F.3d at 1333. The Eleventh Circuit did not mention

state commissions' authority to implement § 271, *see id.* at 1333-35, and indeed the two district courts in the Eleventh Circuit to have addressed the question concluded that state commissions have no such authority.[5]

In contrast to the Eleventh Circuit's decision on commingling, the Eighth Circuit's decision in this case addressed the question of state commissions' authority to implement § 271. *See* Pet. App. 9a-12a. The Eighth Circuit made no mention of the commingling issue that the Eleventh Circuit decided in *NuVox*; in fact, the court below did not even cite the rule that petitioners assert is at issue here. Nor did the decision below reach the district court's independent holding that a state-commission order requiring incumbents to provide combinations of facilities conflicts with FCC orders. *See id.* Because the Eighth and Eleventh Circuits addressed different questions, there is no conflict between the decision below and *NuVox* that could merit this Court's review.

2. Review is unwarranted for the additional reason that, even under the Eleventh Circuit's decision,

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[5] A separate Florida commission decision held that state commissions lack authority to implement or enforce § 271. A Florida district court affirmed that Florida commission order in *Dieca*, 447 F. Supp. 2d at 1286 (cited *supra* note 1). An appeal of the district court's judgment in *Dieca* was dismissed with prejudice on the appealing competitor's motion. *See* Order, No. 06-15589-DD (11th Cir. Dec. 12, 2006) (per curiam). In addition, a Georgia district court reversed a Georgia commission order asserting jurisdiction to implement § 271; that case is now pending in the Eleventh Circuit. *See BellSouth*, Nos. 1:06-cv-00162-CC & 1:06-cv-00972-CC, slip op. at 7-12 (cited *supra* note 1). Thus, the only courts in the Eleventh Circuit to have addressed the § 271-authority question that the Eighth Circuit decided in this case reached the same conclusion as the decision below.

the result in this case would have been the same. The *NuVox* court made clear that, where a state applies the FCC's "commingling" rule to require an incumbent LEC to combine a § 251 UNE with an element that must be made available under § 271, the resulting combination of facilities would be priced at "market rates." *See* 530 F.3d at 1335 ("Incumbent LECs are permitted to charge market rates for section-271 elements, making them distinguishable from the cost-based facilities mandated under the original UNE platform."); *see also supra* pp. 3-4 (explaining FCC's conclusion that market prices apply to § 271 elements); Pet. 9 (noting the Eleventh Circuit's holding on this point). The Missouri commission's decision at issue here, by contrast, required AT&T Missouri to provide the UNE-Platform at a regulated rate established by the state commission. *See* Pet. App. 119a. Even under the Eleventh Circuit's reasoning, that state-commission requirement would conflict with federal law, as the district court here recognized. *See id.* at 39a-41a (reasoning that, even if the Missouri commission had authority to require unbundling of § 271 elements, its decision would be unlawful, in part because it required AT&T Missouri to provide § 271 elements at the same transitional rates that the FCC set for § 251 UNEs). Thus, even if the Eighth Circuit had reached the commingling issue and decided it in petitioners' favor, the Eleventh Circuit's approach would have resulted in affirming the district court's judgment, confirming that there is no conflict between the circuits.

3. Finally, even if a circuit conflict existed on the interpretation of the FCC's commingling rule, the FCC could address that conflict itself through the exercise of its authority to interpret and enforce the

1996 Act. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-84 (2005) (holding that FCC can interpret ambiguous statutory provisions even after a court of appeals purports to construe them, and when it does so its determination is binding nationwide under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *see also Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) (the Court "accept[s]" an agency's interpretation of its own regulation unless it is "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). That the FCC has not addressed the interpretive question at issue in the Eleventh Circuit's *NuVox* case is yet another reason counseling against this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY P. LEAHY
ROBERT J. GRYZMALA
SOUTHWESTERN BELL
TELEPHONE COMPANY
D/B/A AT&T MISSOURI
LEGAL DEPARTMENT
One AT&T Center
Room 3520
St. Louis, Missouri 63101
(314) 235-4300

MICHAEL K. KELLOGG
Counsel of Record
SEAN A. LEV
COLIN S. STRETCH
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for AT&T Missouri

November 21, 2008